Supreme Court, U.S.
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No. 03-246

IN THE

Supreme Court of the United States

WILLIAM A. BORDERS, JR.,

Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF BAR COUNSEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, upon the grant of a presidential pardon to an attorney previously disbarred by the District of Columbia Court of Appeals on the basis of a determination that his criminal convictions involved moral turpitude, that licensing court is precluded from implementing its procedures for determining whether the attorney is fit to resume the practice of law and instead must reinstate the attorney automatically.

2. Whether the congressionally enacted statute committing to the discretion of the District of Columbia Court of Appeals the determination whether to reinstate to the practice of law an attorney pardoned for offenses that resulted in his disbarment is an unconstitutional infringement of the President's pardon power.

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INTRODUCTION AND SUMMARY

The decision of the District of Columbia's highest court that is challenged here presents no issue warranting the grant of *certiorari*. The court below declined to grant automatic reinstatement to the practice of law to an attorney who received a presidential pardon years after he had been disbarred for convictions that had been determined in the original disciplinary proceeding to inherently involve moral turpitude, and after the attorney had failed in reinstatement proceedings to establish to the satisfaction of the court that he was fit to resume the practice of law. Instead, the court below ruled that the effect, if any, of the pardon may be considered in another reinstatement proceeding to determine whether Petitioner is now fit to resume the practice of law. This decision was well within the authority of the court below, as indicated by numerous decisions of this Court recognizing the authority of courts of the states and the District of Columbia to regulate the legal profession to ensure the competency and moral fitness of its members. Further, in its ruling the court below properly relied on a congressionally enacted statute, D.C. Code § 11-2503(a), which specifically grants the court discretion to determine whether to vacate an order of disbarment premised on convictions for crimes of moral turpitude when those crimes are subsequently pardoned.

The decision of the court below and the statute on which it relied are not at odds with this Court's decisions interpreting the Pardon Clause. Disbarment pursuant to D.C. Code § 11-2503(a) is neither punishment for the offense nor a disability imposed on account of a conviction. Rather, it is the consequence of a determination that the offense involved moral turpitude, and thus the attorney can no longer be

deemed to possess the moral prerequisites for the practice of law. A presidential pardon for such a crime, which is an act of grace, may be granted for any reason or no reason at all. A pardon is not, however, a determination that the attorney is morally fit or competent to resume the practice of law. Recognizing this principle, the federal and state courts that have considered the issue have stated that the proper course to follow when an attorney is pardoned for a conviction on which his disbarment was premised is precisely what the court below decided – to consider the effect, if any, of the pardon in a reinstatement proceeding. *E.g., Grossgold v. Supreme Court of Illinois*, 557 F.2d 122 (7th Cir. 1977); *In re Kaufman*, 245 N.Y. 423, 157 N.E. 730 (1927) (Cardozo, C.J.); *In re Lavine*, 2 Cal.2d 324, 41 P.2d 161, *modified*, 42 P.2d 311 (1935). There is no conflict between the decision of the court below and the other federal and state cases dealing with the issue. For all these reasons, *certiorari* should be denied.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article II, section 2, clause 1 of the United States Constitution states in relevant part:

> The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

D.C. Code § 11-2503(a) states:

> When a member of the bar of the District of Columbia Court of Appeals is convicted of an offense involving moral turpitude, and a certified

> copy of the conviction is presented to the court, the court shall, pending final determination of an appeal from the conviction, suspend the member of the bar from practice. Upon reversal of the conviction the court may vacate or modify the suspension. If a final judgment of conviction is certified to the court, the name of the member of the bar so convicted shall be struck from the roll of the members of the bar and such person shall thereafter cease to be a member. Upon the granting of a pardon to a member so convicted, the court may vacate or modify the order of disbarment.

STATEMENT OF PROCEEDINGS BELOW

Petitioner, William A. Borders, Jr., was convicted in federal court in March 1982 of conspiracy to bribe a United States district judge (18 U.S.C. § 371), obstruction of justice (18 U.S.C. §§ 2, 1503), and two counts of traveling in interstate commerce with intent to commit bribery (18 U.S.C. § 1952). *See United States v. Borders*, 693 F.2d 1318 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983). The judge involved was then federal district judge Alcee L. Hastings, a longtime friend of Petitioner. The evidence showed that Petitioner conducted an elaborate and sophisticated scheme to induce $150,000 in bribes from two criminal defendants who had been convicted of racketeering in a jury trial before Judge Hastings. *Id.* at 1319-24. The bribe money was to be shared with the judge, who was considering not only their criminal sentencings but also a related forfeiture of $1.2 million worth of property. Petitioner received a $25,000 down payment on the bribe from an undercover agent. The remainder was to be paid after the forfeiture was set aside. *Id.* at 1321. The judge then issued an order setting

aside the forfeiture in part, returning $845,000 to the defendants. *Id.* at 1322. Petitioner was arrested three days later, after receiving the remaining $125,000. *Id.* at 1323. In May 1982, Petitioner was sentenced to four concurrent five-year terms of imprisonment and fined $35,000. *Id.* at 1319.

Following his conviction and sentencing, on June 7, 1982, the court below suspended Petitioner from the practice of law in the District of Columbia and referred the matter to the court's Board on Professional Responsibility ("Board") for a recommendation whether the crimes of which Petitioner had been convicted involved moral turpitude within the meaning of D.C. Code § 11-2503(a).[1] *In re William A. Borders, Jr.*, No. 1982-81, at 1 (D.C. Board on Professional Responsibility, Nov. 2, 1982) (reprinted in the Appendix ("App."), *infra*).

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1. The court below has held that a crime involves moral turpitude if "the act denounced by the statute offends the generally accepted moral code of mankind"; if it involves "baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man"; or if the act is "contrary to justice, honesty, modesty, or good morals." *In re Colson*, 412 A.2d 1160, 1168 (D.C. 1979) (*en banc*) (holding that obstruction of justice involves moral turpitude *per se*). Where the offense does not involve moral turpitude inherently or *per se*, that is, based on an examination of the elements of the offense, a hearing is held to determine whether the offense involves moral turpitude on its facts. *Id.* at 1164-65. If it is unclear whether the crime involves moral turpitude *per se*, the court below has instructed that a hearing should be held and evidence admitted "that goes to the moral implications of the particular [attorney's] acts, as a way of determining whether his particular offense involved moral turpitude, even if the crime cannot be said *per se* to do so." *Id.* at 1165 n.10.

Petitioner was notified of the institution of formal disciplinary proceedings against him under the court's order but did not enter an appearance before the Board and filed no brief or other submission. *Id.* at 1-2 (App. at 2a). On November 2, 1982, the Board, relying on the prior decision of the court below in *In re Colson*, *supra* note 1, stated its view that at least two of the crimes of which Petitioner had been convicted – conspiracy to bribe a federal judge and obstruction of justice – "necessarily involve moral turpitude *per se* and it is therefore unnecessary for the Board to refer this case to a Hearing Committee at this time to take testimony as to factual details of these crimes of [Petitioner]." *Id.* at 2 (App. at 2a). The Board recommended that Petitioner be disbarred once his conviction of either crime became final. *Id.* at 4 (App. at 4a).

On December 10, 1982, Petitioner's convictions were affirmed on appeal, *United States v. Borders, supra*, and on April 25, 1983, this Court denied *certiorari*, 461 U.S. 905. Thereafter, on August 31, 1983, the court below ordered Petitioner disbarred pursuant to D.C. Code § 11-2503(a) concluding, based on the record of conviction and the report and recommendation of the Board (which it appended to and incorporated in its decision), that at least two of the crimes of which Petitioner had been convicted inherently involved moral turpitude. *In re William A. Borders, Jr.*, No. M-122-82 (D.C. App. Aug. 31, 1983) ("*Borders I*") (Petitioner's Appendix ("Pet. App.") at 10a-11a).

During the seven years immediately following his convictions and sentencing, Petitioner, who had not testified at his criminal trial, refused to testify on four occasions before official bodies concerning the circumstances of the offenses:

(1) before a grand jury investigating Judge Hastings[2]; (2) in connection with an investigation of Judge Hastings' conduct by a judicial body; (3) before the House Subcommittee on Criminal Justice; and (4) at Judge Hastings' impeachment trial in the United States Senate.[3] *See In re Borders*, 665 A.2d 1381, 1383 (D.C. 1995) ("*Borders II*"). Petitioner's refusals to testify before the grand jury and at Judge Hastings' impeachment trial in the Senate, despite grants of use immunity, resulted in two separate findings against him of civil contempt and led to additional periods of incarceration. *Id.*

In August 1993, following a decision by the court below that henceforth any attorney who was disbarred could seek reinstatement after five years, *In re McBride*, 602 A.2d 626 (D.C. 1992) (*en banc*), Petitioner applied for reinstatement. A Hearing Committee considered extensive testimony from Petitioner and his character witnesses, as well as from government investigators. The transcript of Petitioner's criminal trial and documentation concerning his subsequent refusals to testify were received in evidence. Petitioner did not take issue with the correctness of the jury verdict or the gravity of his conduct, acknowledging that it had been

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2. Judge Hastings was tried separately and acquitted by a jury in February 1983. *United States v. Hastings*, Crim. No. 81-596-CR-ETG (S.D. Fla.). As the Eleventh Circuit noted, however, the jury that convicted Petitioner of conspiracy necessarily found that the government had proven the involvement of Judge Hastings, the only other conspirator named in the indictment. *United States v. Borders, supra*, 693 F.2d at 1324.

3. The impeachment proceedings resulted in Judge Hastings' removal from the federal bench. He was subsequently elected to the U.S. House of Representatives, where he now serves.

"corrupt." *Borders II*, 665 A.2d at 1383. He continued his refusal to answer questions about the events that led to his convictions, however, maintaining that his criminal conduct was "unexplainable." *Id.* With respect to his refusals to cooperate throughout the proceedings against Judge Hastings, Petitioner stated:

> There is a time when no justice is served by trying to bring evil on another person. The man who holds his tongue in these situations must be willing to pay the price for his silence. If he believes that his silence serves a higher good, he must be willing to pay for that higher good.

Id. at 1384. Both the Hearing Committee and the Board recommended that the court below deny the petition for reinstatement. *Id.*

On October 26, 1995, the court below rejected Petitioner's first petition for reinstatement. *Id.* Applying its standards for reinstatement as enunciated in *In re Roundtree*, 503 A.2d 1215 (D.C. 1985), the court concluded that Petitioner had failed to establish by clear and convincing evidence his fitness to practice law, particularly with respect to his "conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones," and his "present character." *Borders II*, 665 A.2d at 1382-85. This determination stemmed from "the record of petitioner's complete refusal to testify about the events underlying his convictions in the years since the imposition of discipline." *Id.* at 1383. The court also noted that Petitioner seemed to view himself as a "victim" in the matter rather than the "causative actor." *Id.* at 1384. Agreeing with the Hearing Committee and the Board, the court found Petitioner's "'commitment to silence about the events [to

be] longstanding and deeply felt,' but one contrary to his ethical obligations as an attorney." *Id.* (brackets in original). The court noted that under the relevant disciplinary rules, Petitioner was obligated to report misconduct of other attorneys and judges.[4] Further, his "refusal to answer questions when subpoenaed to testify under grants of immunity was incompatible with these obligations and reflects unfavorably upon his rehabilitation." *Id.* The court concluded that, should Petitioner "again face a similar decision, 'there is no indication in [p]etitioner's evidence that he would follow a different course today.'" *Id.* (brackets in original). The court summarized the obstacle to Petitioner's reinstatement as follows:

> Petitioner's motivation remains unexplained. As the Hearing Committee stated, "Without an understanding of how or why Petitioner engaged in conduct so out of keeping with the William Borders everyone knew and respected in 1981, it is very difficult for the Bar to have confidence that he will not do the same thing again."

Id. at 1385.

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4. Former Disciplinary Rule 1-103(A), Disclosure of Information to Authorities, in effect at the time of Petitioner's refusals to testify following his convictions, provided that "[a] lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges." District of Columbia Rule of Professional Conduct 8.3(b), in effect since 1991, provides that "[a] lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

Petitioner's second petition for reinstatement was dismissed by the Board on July 14, 1999, on the grounds that the application failed on its face to demonstrate Petitioner's entitlement to a hearing. Petitioner filed a brief with the court below excepting to the dismissal, but withdrew his exception in February 2000. Instead, he pursued a pardon, which was granted by President William J. Clinton on January 20, 2001.

On December 21, 2001, Petitioner moved the court below to vacate the order of his disbarment and reinstate him to the practice of law, arguing that the pardon had "nullified" and "invalidated" his conviction, thus rendering the sanction of disbarment "null and void." A three-judge panel of the court "reject[ed] petitioner's argument that the pardon requires his automatic reinstatement without regard to whether he has established fitness to resume practice in accordance with D.C. Bar Rule XI, § 16(d) and the factors set forth in *In re Roundtree*, 503 A.2d 1215 (D.C. 1985)." *In re Borders*, 797 A.2d 716, 718 (D.C. 2002) (*"Borders III"*). The court relied on the language and legislative history of D.C. Code § 11-2503(a), concluding that "[t]he legislature's use of the permissive 'may' on its face, would seem to defeat petitioner's argument that the court has no discretion but to reinstate an attorney disbarred under the statute but subsequently pardoned." *Id.* at 717 (Pet. App. at 7a). The court denied the petition "without prejudice to the filing of a proper petition for reinstatement before the Board, in which petitioner may urge the pardon as a consideration favoring reinstatement." *Id.* (Pet. App. at 6a). Petitioner sought rehearing *en banc*, which was denied on April 16, 2003 (Pet. App. at 1a-4a).[5] This petition followed.

5. Three judges dissented from the denial of rehearing *en banc*, stating that the Court should consider Petitioner's legal challenge without requiring him to petition for reinstatement.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COURT BELOW IS WELL WITHIN THE AUTHORITY CONFERRED ON IT BY CONGRESS TO REGULATE THE LEGAL PROFESSION IN THE DISTRICT OF COLUMBIA

This Court previously has had occasion to note that each State

> has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. . . . The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice.

Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434 (1982); *accord*, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 (1983); *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 460 (1978); *Goldfarb v. Virginia Bar*, 421 U.S. 773, 792 (1975). The Court has emphasized that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb*, 421 U.S. at 792; *accord*, *Ohralik*, 436 U.S. at 460.

The court below has been vested by Congress with the responsibility for regulating the legal profession in the District of Columbia, and empowered to "make such rules

as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." D.C. Code § 11-2501(a); *see also* D.C. Code § 11-2502. Pursuant to that authority, the court has promulgated a rule conditioning admission to the bar of the court on the applicant's demonstration, by clear and convincing evidence, of "good moral character and general fitness to practice law." D.C. App. R. 46(d), (e). The court below has also promulgated rules of professional conduct (*see* Rule X of the Rules of the District of Columbia Court of Appeals Governing the Bar ("D.C. Bar R.")), and rules governing the conduct of disciplinary proceedings (D.C. Bar R. XI), including reinstatement of disbarred and suspended attorneys (*id.*, § 16).

The court below has been directed by Congress to disbar summarily attorneys who have been convicted of criminal offenses involving moral turpitude. D.C. Code § 11-2503(a). In enacting the original legislation granting this authority, the legislators stated that the purpose of the provision for summary disbarment upon proof of conviction of an offense involving moral turpitude was "to make the record of the conviction work automatically," *To Amend the Code of the District of Columbia*, Hearings on H.R. 14974 Before the House Comm. on the Judiciary, 64th Cong., 1st Sess. 63 (1916), and thus "avoid the necessity of retrial of a matter [in a disbarment proceeding] in case of conviction by a petit jury . . . ," *id.* at 64. The court below has interpreted this authority as mandating disbarment upon proof of conviction and a determination that the elements of the offense at issue "inherently" or "manifestly involve moral turpitude by virtue of their underlying elements. . . ." *In re Colson*, *supra* note 1, 412 A.2d at 1164. On the other hand, where moral

turpitude is not evident from an examination of the elements of the offense alone, "a full hearing becomes necessary" to determine whether the offense is one involving moral turpitude, thus requiring disbarment under the statute. *Id.* at 1165.

The same D.C. Code section that requires the court below to disbar an attorney convicted of an offense found to involve moral turpitude also provides that upon the grant of a pardon to an attorney so convicted, "the court *may* vacate or modify the order of disbarment." D.C. Code § 11-2503(a) (emphasis added). The legislative history of the statute makes clear that the legislators intended to provide the court with discretion in this matter. The current version of this portion of the statute is essentially the same as the 1920 version. *See In re McBride, supra,* 602 A.2d at 638-40. In proposing the language that was ultimately adopted in 1920, the U.S. House of Representatives Committee on the Judiciary "explained that a pardon would not automatically reverse any disbarment; rather, *the decision to reinstate after a pardon remained with the court.*" *Id.* at 638 n.23 (citing *To Amend the Code of the District of Columbia, supra,* at 65 (emphasis added)); *see also Borders III,* 797 A.2d at 717 (Pet. App. at 7a).

Under the rules of the court below, once disbarred, an attorney seeking reinstatement has the burden of establishing by clear and convincing evidence both "[t]hat the attorney has the moral qualifications, competency, and learning in law required for readmission," and "[t]hat the resumption of the practice of law by the attorney will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest." D.C. Bar R. XI, § 16(d).

Two of Petitioner's offenses – conspiracy to bribe a federal judge and obstruction of justice – were determined by the court below in 1983 to involve moral turpitude *per se*, requiring his disbarment under D.C. Code § 11-2503(a). *Borders I, supra* (Pet. App. at 10a). Further, in 1995, following an examination of both the conduct that resulted in his convictions and his post-conviction conduct, the court below denied Petitioner reinstatement due to his failure to satisfy the court's standards for readmission by clear and convincing evidence. *Borders II, supra* (Pet. App. at 5a-9a). The decision of the court below to reject Petitioner's motion for automatic reinstatement to the bar based on his pardon in 2001, without regard to his satisfaction of these standards, was well within the authority conferred on the court by Congress to regulate the legal profession in the District of Columbia and the specific grant of discretion in D.C. Code § 11-2503(a) to deny reinstatement to an attorney who receives a pardon for crimes of moral turpitude that led to his disbarment.

II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT INTERPRETING THE PARDON CLAUSE, OR WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS OR STATE COURTS OF LAST RESORT

Apparently recognizing that the decision of the court below was well within the authority conferred on it by Congress, Petitioner argues that "[t]o the extent that D.C. Code § 11-2503(a) suggests that reinstatement is permissive, rather than mandatory, in these circumstances, it is inconsistent with the President's pardon power, and therefore must yield." Petition at 12. Petitioner's argument

hinges on his contention that, because he was disbarred based on the record of his convictions, not, in his view, on the underlying conduct, his disbarment was punishment for, or a disability resulting from his convictions.

This Court has stated that "the granting of a pardon is . . . 'an executive action that mitigates or sets aside *punishment* for a crime.'" *Nixon v. United States*, 506 U.S. 224, 232 (1993) (emphasis in original). The imposition of professional discipline does not constitute punishment, whether as a matter of constitutional law or a component of attorney ethics. In *Ex parte Wall*, 107 U.S. 265, 288 (1882), the Court explained that an attorney disciplinary proceeding following conviction of a crime "is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practise in them." The court below has repeatedly made clear that its disciplinary sanctions are designed not to punish attorneys, but rather "to maintain the integrity of the profession, to protect the public and the courts, and to deter other attorneys from engaging in similar misconduct." *E.g., In re Abrams*, 689 A.2d 6, 12 (D.C.) (*en banc*), *cert. denied*, 521 U.S. 1121 (1997); *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (*en banc*).

It is true that Petitioner was disbarred under D.C. Code § 11-2503(a) based on the record of his convictions, rather than following a full evidentiary hearing on the details of the criminal conduct. Petitioner was disbarred, however, based on a finding that his convictions necessarily involved moral turpitude. Both the Board and the court below determined in the original disciplinary proceeding that, given the court's prior decision in *In re Colson, supra* note 1, that obstruction of justice is a crime involving moral turpitude

per se, and given the elements of the offense of conspiracy to bribe a federal judge, there was no possibility that the offenses did not involve moral turpitude, and thus it was "unnecessary . . . to refer this case to a Hearing Committee at this time to take testimony as to factual details of these crimes of [Petitioner]." *In re William A. Borders, Jr.*, No. 1982-81, *supra* (Board report) (App. at 2a); *see Borders I* (Pet App. at 10a) (incorporating Board report). While the disciplinary proceeding was summary, as envisioned by Congress when it enacted D.C. Code § 11-2503(a), "to make the record of the conviction work automatically," and thus "avoid the necessity of retrial of a matter [in a disbarment proceeding] in case of conviction by a petit jury . . . ," *To Amend the Code of the District of Columbia*, *supra*, at 63, 64, it was nevertheless a disciplinary proceeding, not a criminal sentencing, and there was a finding that Petitioner's criminal convictions necessarily involved moral turpitude.[6]

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6. Petitioner's situation is thus distinguishable from that of the attorney in *Ex parte Crisler*, 159 Miss. 247, 132 So. 103 (1931), on which Petitioner relies. There, the order of disbarment was entered as a part of the criminal sentence rather than in a separate disciplinary proceeding. The court deemed it to be part of the punishment imposed for the crime, and held that the subsequent grant of a gubernatorial pardon required that the disbarment order be annulled.

There is a certain irony in Petitioner's position. In Petitioner's view, an attorney such as himself, disbarred summarily based on the record of conviction because an examination of the elements of the offense demonstrates that it necessarily involves moral turpitude, is entitled to automatic reinstatement to the practice of law upon receipt of a pardon. On the other hand, an attorney who commits an offense the moral turpitude of which is not evident from its elements, and who is disbarred only after an exploration of the circumstances of the offense at a hearing demonstrates moral turpitude, would not be entitled to automatic reinstatement upon receipt of a pardon.

In pressing his claim that the decision of the court below infringes the President's pardon power, Petitioner relies principally on *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). He urges that *Garland* "stands not only for the general proposition that the President's pardon power nullifies any disabilities that attach as a result of the pardoned conviction, but also for the specific proposition that deprivation of the ability to practice law constitutes a 'disability' or 'punishment' that can be nullified by a pardon." Petition at 8. Petitioner misreads *Garland*. In *Garland* the Court held that insofar as an 1865 Act of Congress required attorneys, in order to maintain membership in the bar of the federal courts, to take an oath that they had neither aided the Confederacy during the Civil War nor held office in the Confederate government, it was unconstitutional both as a bill of attainder and an *ex post facto* law. It excluded attorneys from their profession based on past conduct and thus was a form of punishment for past conduct. 71 U.S. (4 Wall.) at 377. In so ruling, this Court criticized the statute in question as an attempt by Congress to regulate the conduct of attorneys who

> are not officers of the United States. . . . They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. . . . , and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. *Their admission or their exclusion . . . . is the*

> *exercise of judicial power*, and has been so held in numerous cases.

Id. at 378-79 (emphasis added).

The expansive language in *Garland* on which Petitioner relies, concerning the "blotting out" of guilt by a presidential pardon,[7] was *dictum* which the Court viewed as "strengthening" its holding that the legislation at issue was unconstitutional as a bill of attainder and an *ex post facto* law. *Id.* at 380. This language has almost universally been interpreted by the lower courts as *dictum* and inconsistent with both earlier and later decisions of this Court interpreting the Pardon Clause. *E.g.*, *In re North (George Fee Application)*, 314 U.S. App. D.C. 102, 105, 62 F.3d 1434, 1437 (1994) (Div'n for the Purpose of Appointing Independent Counsels); *United States v. Noonan*, 906 F.2d 952, 958 (3d Cir. 1990); *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975); *In re Abrams*, *supra*, 689 A.2d

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7. The passage at issue is as follows:

> A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

71 U.S. (4 Wall.) at 380-81.

at 16-19; *In re Lavine*, 2 Cal.2d 324, 331-32, 41 P.2d 161, 164, *modified*, 42 P.2d 311 (1935). Indeed, given the *Garland* Court's earlier emphasis on the authority of the courts to regulate the legal profession, the *dictum* can hardly be read as mandating reinstatement to the bar of the court of an attorney disbarred for a conviction involving moral turpitude who later receives a presidential pardon. Moreover, given *Garland's* emphasis on the authority of the courts to regulate the legal profession, the decision of the court below is entirely consistent with *Garland*.

Nor is the decision of the court below inconsistent with any of the other decisions of the Court interpreting the Pardon Clause. *E.g., Knote v. United States*, 95 U.S. 149, 153-154 (1877) ("[A pardon] does not make amends for the past. . . . The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required."); *Carlesi v. New York*, 233 U.S. 51 (1914) (use of a pardoned conviction for sentence enhancement does not constitute punishment for the earlier offense in derogation of the President's pardon authority); *Burdick v. United States*, 236 U.S. 79, 91 (1915) (a pardon implies guilt of the offense for which it is granted). In a leading scholarly analysis of this Court's Pardon Clause cases, Professor Samuel Williston concluded:

> The true line of distinction seems to be this: The pardon removes all *legal punishment* for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime

> without conviction, the pardon removes such disqualifications. *On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.*

Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv. L. Rev. 647, 653 (1915) (emphases added). Here, Petitioner's disbarment was not legal punishment, character is unquestionably a necessary qualification for membership in the bar, Petitioner's crimes would have disqualified him from the practice of law even if he had not been prosecuted criminally, and the fact that he has been convicted and pardoned does not make him any more eligible for membership in the bar.

Professor Williston's view of the Court's cases on the Pardon Clause is shared almost universally by the lower courts, whose decisions are consistent with that of the court below. Where, as here, an order of disbarment has been entered *before* the conviction is pardoned, the lower courts have stated that the pardon does not erase the fact of the attorney's conviction and the moral turpitude inherent in the very elements of the offense, and thus the proper course is to consider the effect of the pardon in reinstatement proceedings. *Borders III*, 797 A.2d at 718 (Pet. App. at 8a-9a)[8]; *accord*, *Grossgold v. Supreme Court of Illinois*, 557

8. Petitioner's claim that the court below failed to follow its own prior holding in *In re Abrams, supra,* is incorrect. Petitioner cites language in *Abrams* suggesting that if Bar Counsel had sought to disbar Abrams summarily under D.C. Code § 11-2503(a) based

(Cont'd)

F.2d 122, 125 (7th Cir. 1977) (upon grant of presidential pardon, attorney disbarred on account of conviction of crime involving moral turpitude not entitled to automatic reinstatement but may urge pardon as a consideration for reinstatement)[9]; *In re Lavine, supra* (same; gubernatorial

(Cont'd)
on his conviction of a crime of moral turpitude, rather than for violations of the disciplinary rules based on the underlying conduct, such a course would have been "precluded" because Abrams was pardoned before any disciplinary sanction was imposed. As the court below noted, its holding is not inconsistent with this *dictum* in *Abrams* because Petitioner was not pardoned until long *after* his summary disbarment pursuant to D.C. Code § 11-2503(a). *Borders III*, 797 A.2d at 717-18 (Pet. App. at 7a-8a).

For the same reason, Petitioner's reliance on *Scott v. State*, 6 Tex.Civ.App. 343, 25 S.W. 337 (Tex. Civ. App. 1894), and *In re Emmons*, 154 P. 619, 621 (Cal. Ct. App. 1915), is misplaced. These cases concern the disbarment of an attorney based solely on the record of a conviction *after* the conviction has been the subject of a pardon. In these circumstances, a disciplinary proceeding may be instituted based on the underlying conduct, but not on the basis of the record of the conviction alone. *See* Office of Legal Counsel, U.S. Department of Justice, *Memorandum for the Pardon Attorney*, June 19, 1995 (*available at* www.usdoj.gov/olc/pardon3.19.htm). As this and other Departmental opinions make clear, a presidential pardon does not foreclose the imposition of professional discipline. *E.g.*, *Op. Att'y Gen. No. 78-84*, 2 Op. Off. Legal Counsel 370 (1977) ("while a pardon relieves the offender of all disabilities imposed by way of punishment, it does not relieve an offender of disabilities that attend a conviction").

9. Grossgold had been suspended from the practice of law some five years after his conviction on nine counts of mail fraud. Less than a month later he received a presidential pardon. The Seventh Circuit found it lacked subject matter jurisdiction to consider the (Cont'd)

pardon for crime of moral turpitude); *In re Kaufman*, 245 N.Y. 423, 430-31, 157 N.E. 730, 733 (1927) (same; presidential pardon for felony conviction). This point was stated eloquently by Chief Judge (later Justice) Cardozo in a case in which a presidential pardon had been granted four years after a summary disbarment based on a felony conviction:

> [R]einstatement will not follow automatically from pardon without more. . . . There must be convincing proof of innocence before pardon will restore to the fellowship of the bar. Even innocence of crime will not suffice if there has been a failure to live up to the standards of morality and honor. Pardon does no more than open the door to an inquiry that would otherwise be barred.[10] . . . [T]he power to pardon is bestowed on the Executive. For this, the statute says that upon pardon or reversal, the power to reinstate shall be vested in the courts.[11]

(Cont'd)

matter. Nevertheless, assuming *arguendo* that it had jurisdiction, the court went on to declare that "the presidential pardon did not wipe out the moral turpitude inherent in the factual predicate supporting plaintiff's mail fraud conviction," 557 F.2d at 125, and did "not relieve [the] attorney from discipline," *id.* at 126.

10. The *Kaufman* Court was speaking in the context of a disciplinary system in which disbarments are otherwise permanent.

11. The New York statute under which Kaufman was disbarred contained a provision virtually identical to that in D.C. Code § 11-2503(a), making reinstatement after a pardon discretionary with the court. *See* 245 N.Y. at 426, 157 N.E. at 731.

The federal and state authority on which Petitioner relies is all inapposite. See notes 6 and 8, *supra*.[12]

III. THE DECISION OF THE COURT BELOW DOES NOT HAVE FAR-REACHING IMPLICATIONS

Petitioner contends that the decision of the court "will have potentially enormous consequences" for the recipients of pardons because it "greatly limits the scope of the presidential pardon power," "allowing disabilities that depend solely on a federal conviction to remain in effect even when the conviction has been nullified" by a pardon. Petition at 15-16. To the contrary, as demonstrated above, the decision does not concern a disability or punishment imposed for a pardon. The decision is limited to the situation in which an attorney who has previously been disbarred for a conviction found to involve moral turpitude is subsequently granted a pardon. The holding that the pardon does not strip the court below of its authority in this circumstance to require that the attorney demonstrate his competence and moral fitness before being reinstated to the practice of law is consistent with

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12. Petitioner contends that the decision of the court below is in conflict with the Seventh Circuit's decision in *Bjerkan v. United States*, 529 F.2d 125 (7th Cir. 1975). To the contrary, the decision of the court below is consistent with the relevant Seventh Circuit authority, *Grossgold*, on which the court below relied. *Borders III*, 797 A.2d at 718 (Pet. App. at 9a); see note 9, *supra*. In *Bjerkan*, the Seventh Circuit held that the grant of a pardon to a prisoner mooted his appeal of the denial of his motion pursuant to 28 U.S.C. § 2255, because the pardon removed all collateral consequences of his conviction. The decision has no application to the situation of an attorney who is pardoned after his disbarment for a criminal conviction involving moral turpitude, the precise question presented in *Grossgold*.

Ex parte Garland and other decisions of this Court interpreting the President's power under the Pardon Clause, as well as with relevant authority in both the federal and state courts. Contrary to Petitioner's contention, no "recurring" question "of exceptional importance" is presented.[13]

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13. Petitioner acknowledges that even if this Court were to grant *certiorari* and reverse the ruling of the court below, a disciplinary proceeding could yet be brought against him for the underlying disciplinary rule violations. Petition at 16 n.11. Thus, Petitioner's success in this Court might result only in the reinstitution of disciplinary proceedings at which he could again be disbarred. In this regard, Petitioner has never testified that he did not commit the criminal offenses of which he was convicted, either at his 1982 trial or at the 1993 hearing on his first petition for reinstatement. Indeed, in seeking reinstatement, Petitioner "admitt[ed] that his conduct had been 'corrupt.'" *Borders II*, 665 A.2d at 1383. The complete record of Petitioner's trial, which was before the Hearing Committee, the Board, and the court below in connection with his first petition for reinstatement, clearly established myriad violations of the disciplinary rules in effect at the time of Petitioner's conduct. Petitioner has never contended that the conduct underlying his criminal convictions did not violate these rules. Further, Petitioner's post-conviction refusal to testify before the grand jury investigating Judge Hastings, while he was still a member of the Bar, albeit suspended, constitutes a separate proven, although as yet uncharged, violation of the disciplinary rules.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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